

COMMENT

FURTHER THOUGHTS ON THE PENNSYLVANIA
PERPETUITIES LEGISLATION *

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I must begin with apologies for venturing to talk in an area where so much has already been written by such notable scholars.¹ My justifications, if any, are two. In the first place there is one aspect of the matter which seems vital to me, and which, while it has not gone unnoticed, seems to me by no means to have been adequately stated and stressed. I propose to try to supply this need. In the second place, I think the topic is one that can scarcely be talked about too much. Legislation has already passed in Pennsylvania, Massachusetts, Connecticut and perhaps elsewhere. It is doubtless being proposed in other states, and if not, I am sure it soon will be. And it should be fought. It should be repealed in Pennsylvania and forestalled elsewhere.

A note on history. It is said to repeat itself. And jurisdictions that have modified the common-law rule by statute have usually not been happy with the result. Half a dozen have repealed their legislation and gone back to the common-law rule. New York has not but should; their experiment has been a public scandal. Some states have gone back to the common-law rule in fact, if not in theory, by judicial perversions of the statute.

* A paper delivered at the session of the Section on Real Property, Probate and Trust Law of the American Bar Association at the Upper Ohio Valley Regional Meeting in Pittsburgh on March 12, 1959.

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1. See especially Brégy, *A Defense of Pennsylvania's Statute on Perpetuities*, 23 TEMP. L.Q. 313 (1949); Cohan, *The Pennsylvania Wait-and-See Perpetuity Doctrine*, 28 TEMP. L.Q. 321 (1955); Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952); Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349 (1954); Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?*, 56 MICH. L. REV. 683, 887 (1958); Simes, *Is the Rule Against Perpetuities Doomed? The "Wait-and-See" Doctrine*, 52 MICH. L. REV. 179 (1953); Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707 (1955); Waterbury, *Some Further Thoughts on Perpetuities Reform*, 42 MINN. L. REV. 41 (1957). My obligation to these writers is very obvious and very gratefully acknowledged.

This suggests that too hasty action is risky. Pennsylvania was the first to venture into the area of wait-and-see. Mr. Leach, the great protagonist of wait-and-see, cheers the Pennsylvania legislators as hardy pioneers. "Oh pioneers" apostrophised Walt Whitman, and Leach goes along. Yet I suspect that hardy pioneers may not be quite what the doctor ordered in this area; there are reasons to think they acted too hardily and too hastily. I have said that the legislation should be repealed; if I may, I will publicly go on record as predicting that it will be. (Though this is probably safe enough, as I doubt that I live to see the outcome.)

The first question I would like to throw out is: Is the common-law rule really working so badly? Mr. Leach is a property teacher; they are, by common repute, a conservative folk. Yet, much as I respect him, I have to say that in his crusading he has employed some rather intemperate language. If a use of the pathetic fallacy may be pardoned, I cannot help enjoying the thought of how the entrails of the venerable *Law Quarterly Review* must have quivered as it gave birth to an article entitled: "Staying the Slaughter of the Innocents." In the less prim *Harvard Law Review* the article appeared under the name of "Ending the Rule's Reign of Terror."

Be that as it may, has there really been a reign of terror, a slaughter of the innocents? I doubt it. For one thing, I think if such a charge could be documented, Mr. Leach would have done it. If I am not mistaken, in none of his articles has he collected authorities tending to show that any very great number of wills have currently been the innocent victims of the rule. I have not counted noses (if cases have noses) and I do not assume to set myself up as an authority, but I have been browsing through advance sheets and reading perpetuities cases for quite a number of years and it is not my impression that the casualty rate is high. Mr. Waterbury, who has written a brilliant article on this subject,² has some figures. If I do not misread him, they suggest that in these United States there are not more than three or four casualties a year. Double that, if you like; it's still a trifle. After all, the sea of future interests is a stormy one. Every year many good barks founder on such rocks as class gifts, divide and pay over, vesting, gifts to issue, gifts to survivors, and so on and so on.

Perhaps I may be pardoned if I quote a verse. It is from the Greek Anthology, and has long been a favorite of mine, though I had not until recently thought of it as bearing upon future interests. It goes:

2. See note 1 *supra*.

"A sailor shipwrecked on this coast
Bids you: Take sail!
Full many a gallant ship, when we were lost
Weathered the gale."

"Full many a gallant ship!" who had a competent skipper at the helm, a competent draftsman. It's the ships that go down that get the publicity. We all remember the Titanic—and the Hesperus. We don't think of the Minnie K. Jones, of New Bedford, that's been sailing the seven seas safely for fifty years. It's the bad wills a lawyer draws that turn up in casebooks. Anyhow, the point I am trying to make is that I do not think an undue proportion of these frustrations are the result of the rule. It has a bad name and gets bad publicity. Its victims are, I think, more conspicuous, but not really more common—probably less common—than the other victims of poor draftsmanship. Indeed Mr. Leach's own criticism of the rule amounts to little more than reiterated castigation of a few freak cases which he has popularized by giving them cute names: "The Fertile Octogenarian," "The Precocious Toddler," "The Magic Gravel Pit" and so on.

This suggests to me an interesting point of psychology. Rules, limiting the effectiveness of human activity because of supposed considerations of public policy, are always unpopular. It is always considered a tragedy when they operate. I started to say "fulfill their purpose"—but for some reason that is never the attitude. Consider the Statute of Frauds, which supposes, perhaps foolishly, that certain transactions are so risky that they should not be tolerated unless put into writing. Does anyone remember reading a case in which the court says: "It is a pleasure, in the public interest, to hold that this attempt to create a trust—or contract—or will—must fail for failure to comply with the formalities imposed by the statute? Some scoundrel"—the court continues—"trying to evade the law?" No. Definitely no. Invariably the court says the statute should be a shield and not a sword, and strains everything to find some way to "take the case out" of the Statute of Frauds.

And so it is with the Rule Against Perpetuities. When a limitation is voided thereby, it is deemed a tragedy. Another innocent slaughtered. "One more unfortunate . . . gone to her death." That is not from the Greek Anthology but from Tom Hood. I am surprised that Mr. Leach has not quoted it. Who remembers a court saying: "This is a *shocking* attempt to postpone the vesting of the remainders to a point prohibited by the rule?" Who indeed? Observe this. Numerous plans for amending the rule have been proposed lately—all in favor of making

the rule more liberal, or preventing it from operating. Not within living memory has the proposal been made to make the rule more strict. If no one wants the rule enforced, why amend it? Is it just a noble experiment—like another one of dismal memory? Why not simply abandon it?

I don't know, frankly, whether I make that proposal seriously or not. People can make plenty of foolish provisions within the rule; any good draftsman can tie up property validly for many years and with no good reason shown. So the rule doesn't conspicuously stand in the way of unsocial people with good lawyers. On the other hand, it is my impression—again, I admit, not based on statistics—that very few palpably foolish limitations come up for litigation. Would it be absurd to abandon any rule?

That is an extraordinary difficult question. The difficulty perhaps stems from the fact that our sense of the need for a rule is based largely on an abstraction. We all have, as part of our intellectual inheritance, a feeling that there is something wrong in permitting testators to control to a remote period the devolution of their property. The dead hand, we are likely to say. It is undesirable, unsocial. The world—and particularly its goods—is for the living and not the dead. If we consider the reasons which, from Hume and Grotius and Locke on, have been considered to justify the process of testation, it is clear that none of them have much to say for allowing a man to leave his property to those who shall be his heirs in 2159.

But suppose we ask the sober, practical question: what is the harm of it? And to whom? We say: the law should not allow people to do preposterous things with their property. Perhaps not. But it does. Every year the law permits hundreds of testators to do capricious, prejudiced, cruel things to those who have reasonable claims on their bounty. In this great Commonwealth of Pennsylvania, a widower with crippled, incompetent, or otherwise helpless children, can leave all his property to his girl friend, his dog, or the Society of Philatelists.³ Would it be any worse if he were allowed to leave it to his heirs as of 2159?

It is sometimes said that the purpose of a rule against perpetuities is to keep property in commerce. This may have been convincing in an era of legal estates, present and in remainder, but today's typical will leaves property in trust. And the typical trust corpus is securities. Ordinarily the trust company (today's typical trustee) will have ample

3. This is, of course, subject to the small and temporary relief provided by the family exemption. See §§ 320.211-216 of the Fiduciaries Act of 1949, PA. STAT. ANN. tit. 20, § 320.101 (1950).

powers to change investments, to sell securities and buy new ones, and so on. Is there more threat here to the mobility of property than inheres in the fact (well known) that insurance companies, investment trusts and the like hold so many billion dollars worth of securities in their portfolios, that the supply available to the individual investor is becoming limited?

Mr. Waterbury, whose work in this area I so much admire, seems to put the need for a rule on the right of *T*'s heirs to get their hands on his property without too long a delay. Regretfully, I cannot find much merit in this. It seems out of keeping in a society which otherwise allows testators so much leeway. If we were dealing with a provision for long accumulation, it would be easier to find objections. The chief consideration against any liberty of testation—namely that it puts property into the hands of those who have not earned it, have done nothing to deserve it, and presumptively have no special capacity to handle it wisely—is certainly magnified as the amount of property involved is magnified. But the testator's heirs in 2159 are not likely to get more than he left in 1959; perhaps, considering the cost of trusteeship and the wear and tear caused by the cycle of depression and inflation, they are likely to get less.

In sum, I am not able to give much reason for the slight prejudice I have—and I suspect many of us have. Maybe the best reason one can see for a rule against perpetuities is that if we don't have one, some testator one day will outdo himself in folly, make a will to end all wills, and the outraged court will declare that it cannot be tolerated, and that all estates must vest within a period. . . . In short, we will start all over again with a new rule against perpetuities and some new Barton Leach, yet unborn, will try to rescue us from it by dreaming up a rule of wait-and-see.

Or let us consider something a little different. *T* leaves his estate to his children, grandchildren and great grandchildren for successive lives, then to his Brother Bill in fee. The life estate to grandchildren at least is good; though that to great grandchildren is probably bad; the gift to Bill is good because it is presently vested. Bill won't take in possession, however, until the grandchildren are dead. How much is Bill's interest worth in the meantime? It is not like a long term lease; there is no rent and no known time of termination. Bill will almost certainly be dead; it may be *his* great grandchildren who ultimately get to use the property. Is this any more wholesome, socially speaking, than it would be to let *T* leave his estate to his own great grandchildren? Yet it is valid, because our rule is framed in terms of vesting.

I am suggesting here in passing that there is a school of thought, including conspicuously my learned brothers Simes⁴ and Schuyler,⁵ who, if I understand them right, think that any rule of perpetuities should be framed in terms of vesting in enjoyment rather than vesting in interest. I do not propose to argue this here; it is not within my competence or my topic. I only suggest that considering the history of legislation, and the tendency of bad legislation to preclude good, consideration of possible action should include not only the perhaps fantastic idea of repealing the rule entirely, but also of adopting not some makeshift like wait-and-see, but an act framed in terms of vesting in enjoyment.

Very well. After this perhaps too extended introduction, let us now proceed to "wait-and-see." You are all familiar with the idea, but to be on the safe side I quote the basic provision in the Pennsylvania statute. It reads:

"Upon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events, any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void."⁶

This has a very plausible sound. Surely, the unwary are likely to say, this is just the good old common-law rule, with its worst feature neatly eliminated. The supposed bad feature, I need hardly say, is the occasion of a remainder or executory interest being declared void because of the *possibility* that it will not vest within the period allowed by the rule—although, as it turns out, it vests in fact well within the period. Suppose, for example, in the case of a gift to *T*'s great grandchildren reaching twenty-one, bad at common law because of the possibility *T*'s children might have more children, it turned out that all the grandchildren ever born were alive at *T*'s death, so that in fact the great grandchildren reached twenty-one within twenty-one years after the termination of lives in being. This certainly happens in a considerable proportion of cases. It must have happened, for example, in the famous case of John and Elizabeth Jee,⁷ who were seventy when *T* died.

Such cases infuriate Mr. Leach and many other learned students of the rule. If they are right in being infuriated, obviously something should be done about the situation. What more natural than to wait

4. See note 1 *supra*.

5. *Ibid.*

6. PA. STAT. ANN. tit. 20, § 301.4(b) (1950).

7. *Jee v. Audley*, Cox 324, 29 Eng. Rep. 1186 (Eq. 1787).

and see and hold the remainder or executory interest valid if in fact it vests within a life and twenty-one years?

This is the proposal. The assumption on which it rests is the crux of the matter. I venture to consider the assumption, and, ergo, the proposal, unsound. I am not infuriated, or mildly disturbed, at the case of *T's* great grandchildren. It seems to be no more shocking than that a court should refuse to probate an unsigned will. I am not even really much horrified—and no foolish mortal ever made a greater admission—by *Jee v. Audley*.⁸

The proposition I assert is that in the light of the purpose and philosophy of the rule—the policy intended to be subserved—it is quite irrelevant when the remainder in fact vests. To borrow an illustration from Mr. Simes, it is as irrelevant as the question whether the legatee to whom property is left on condition that he divorce—or choke—his wife, does in fact do so.

To give myself a framework, and, I hope, to clarify matters, let me amplify and subdivide the assertion just made. More specifically, the propositions I assert and will attempt to defend are two: First, that both by the spirit and sense of the rule, it is and should be utterly irrelevant when the interest vests in fact, and, second, that if we completely pervert the sense and intent of the rule, making it turn on the time when the remainder actually vests, then the period allowed by the common-law rule becomes meaningless and absurd, and some different one should be adopted.

Perhaps I can begin best by really going back to fundamentals. Suppose we were to set ourselves to frame a rule against remoteness. Of course we know the rule was not made all at once. Lord Nottingham, who usually gets the credit for it, only started it. But suppose we start out on the assumption that it is unhealthy, socially speaking, to allow the vesting of estates to be postponed too far into the future, how can we best proceed? There are two alternative procedures that are obvious (though I don't say there might not be more). One is to set a period and say: if the remainder doesn't vest in that time, we'll call it void. Fifty years—the life of good Queen Bess—it doesn't matter for the moment. Although I should think some one would say: you mean we have to wait for some period of perhaps many years before we know? How extremely inconvenient! But more of that, later.

That is one approach. Set a time limit and wait to see if the remainder qualifies. Don't decide your horse race on the basis of which horse is the best and most likely to win; wait and see which one

8. *Ibid.*

does win, then pay off the lucky gamblers. This is certainly good sense, horse-race-wise.

The other approach says: we are, after all, not engaged in gambling. It is *T*'s privilege to make remainders contingent and it is often desirable to do so to preserve the maximum flexibility in estate planning; it does not follow that if and as they vest, the law should make their validity depend on quite fortuitous circumstances. As in many other cases involving policy, our purpose is prophylactic. A formula is needed by which it can be determined whether a given limitation is undesirable as likely to delay vesting too long. This will permit immediate decision on the validity of the limitation, something often—if not usually—of vital importance to the parties. If a reasonable formula is worked out, testators can allow for and respect it. They will not be unduly hampered and there will be no disappointed expectation, as long as wills are well drawn. Here I hear Mr. Leach muttering: "Anyone who thought that, was soon disillusioned!" Of course, I have just been lamenting in poetry—not my own—how often wills are *not* well drawn. A little later we can consider the question: assuming certain simple modifications to be made in the common-law rule, will wait-and-see be any more merciful to the ignorant or badly-advised testator?

Everything depends of course on finding a formula that is fair and workable, that neither hampers testators unduly nor tolerates limitations having a marked tendency to perpetuity. And the common-law rule as finally worked out, to some extent, commends itself. I say to some extent; I do not wish to seem to take the position that the rule is perfect. But it permits a *T* to make what is not only a reasonable but a natural limitation—to some life tenant, and then to a remainderman who has attained majority. This looks after children, it looks after grandchildren, it can look after great grandchildren, if *T*'s children are dead and he naturally thinks in terms of great grandchildren and their issue. Of course, when the rule was framed, it was a feat just to reach twenty-one; that probably seemed plenty. With the increase in life expectancies it may seem to us that the period of minority, at least for this purpose, could well be extended to twenty-five or thirty years. Well and good; a statute could readily make such a modification in the rule without altering its essential nature.

The point is that for a rule conceived prospectively, like the rule against encouraging divorce, or the automobile speed limit, and designed to make a formula for testators to live—or die—by, the period of the rule works very well. What else could you do? What sense would a period in gross make? "Remainders must be limited so as to surely vest in fifty years." This doesn't fit testamentary thinking. A rule to

operate prospectively must fit the facts of life, it must be in terms of normal, expectable events.

“To my wife for life and then to my issue in successive life estates, per stirpes, but at the expiration of fifty years from my death, all life estates save that of my wife to terminate and the remainder to vest in my then living issue per capita.”

This, I submit, is possible but not sensible. It does not fit the thinking nor the needs of a testator. What in the world, *T* will say to his attorney; how in the world can you provide for things in terms of fifty years? Tell me: can I leave it to my children, my grandchildren, my great grandchildren? Can I keep it from them until they are thirty? And so on.

If, on the other hand, we wait and see, and say that remainders are good only if they in fact vest within a certain time, then the common-law formula makes little sense. Why? Because lives vary so. They are like the Chancellor's foot, some long, some all too brief. And a public policy that is really concerned with how long it is before the remainders actually vest ought to set the same time for everybody; it surely cannot be satisfied with a rule that turns on how long it is before dear old Uncle Jim obliges by having a heart attack. The possibilities are fantastic. As I shall presently illustrate, the permissible period could turn out to vary from twenty-six to 102 (perhaps more, if we find the right lives).

So it appears plain, at least to me, that a formula in terms of lives in being and minority, necessarily pre-supposes a determination in terms of possibilities—and makes no sense on any other supposition. Shall we say: five yard penalty for off-side? Or shall we say: let's wait and see how much the opposition was hurt by the off-side and figure a penalty on that basis? Any football fan can answer that one. If, on the other hand, we are to wait and see, it appears equally plain that some other type of formula is called for, one that is definite, that is the same for everyone; perhaps one in terms of so many years. And hence my assertion, which may have seemed surprising, that the common-law rule really doesn't care when the estates vest, whether soon or late; it is satisfied if a formula is followed which by and large renders unlikely any great number of objectionable perpetuities.

Think of the hundreds of wills defeated because the *T* didn't know that two witnesses were required or that they must attest in his presence or that he must declare to them that the instrument is his will. Some of these requirements are palpably foolish and should be repealed, as I have pointed out elsewhere, but there are few to assert that statutes of

wills should be abolished and that we should ask courts to determine a man's last wishes on the basis of what he told his friends over the last twenty years of his life, or on his deathbed. The purpose of a wills act is to provide a formula which by and large will safeguard the testamentary process. I am convinced that the spirit of the common-law Rule Against Perpetuities was the same, and that it is foreign to it to ask how long it really was before a particular estate vested.

Thus, if I am right, wait-and-see is not a modification or improvement of the common-law rule; it is something new and different, but not better. It is inconsistent with itself. It applies the common-law formula only in a context where it makes no sense.

Let us consider particular aspects of the new look in perpetuities. For one thing it will presumably not be applied, in spite of the statute, in certain types of cases. This is called "wait-and-see" legislation—but is it always? Often? To repeat, the Pennsylvania statute provides that "upon the expiration of the period . . . as measured by actual rather than possible events, any interest not then vested . . . shall be void." What does this contemplate in the case of a limitation whose validity or invalidity is definite from the beginning? Suppose, for example, a limitation to "my issue per stirpes as of twenty-two years after my death." Or suppose the same but with the period specified as "twenty years after my death." It is clear that the first provision is bad and the second one good. Nothing can change twenty-two years into twenty-one nor twenty into twenty-two. (Except perhaps Mr. Chief Justice Doe.) Since no lives are involved, the time of vesting is determined solely by the number of years mentioned. Hence, the period allowed by the common-law rule is twenty-one years and no more. The statute bids us wait until the expiration of this period as measured by actual events. There are, however, no actual events conceivably having any bearing on the problem—unless we assume some atom-caused alteration in the solar system. If we wait patiently until the end of twenty-one years, we then simply know what we have known all along, that the interest limited to the class of issue by the very terms of the twenty-two year limitation has not and could not have vested. By the same approach in the case of the twenty-year postponement we know in advance that the interest—assuming it ever vests—will have vested, and could not have failed to vest, within the period. What does the statute intend us to do in these cases? Wait and see? For what? Surely not to wait twenty-one years to discover something which has been positively known from the start. There seems only one possible conclusion, namely, to treat the matter as determined as of the time the instrument goes into effect. If so, we are back in the

common-law rule and it seems inconceivable that a court would not decide the issue presently if anyone wished to raise it. And probably someone would so raise it. Experience shows that often limitations whose validity or invalidity is perfectly apparent to even the half-skilled eye, are vigorously challenged or defended, as the case may be, and carried to the highest court at substantial expense to all concerned. A fortiori, this will be true in the case of a statute whose meaning is not known to anyone as of now, and which will probably puzzle courts considerably when they come to construe it.

This is not important save as showing that all will not be wait-and-see; possibilities cannot be completely exorcised. And it may perhaps suggest what some will regard as a meritorious aspect of the new legislation: namely, that the law will not be changed as to well-drafted limitations but that testators who have recklessly or ignorantly drawn doubtful provisions will have a gambler's chance that they may be valid. Precisely—if a gamble is what you want! That is the question to which I immediately address myself.

Let me put a simple illustration. And let me apologize for repeating things which are no doubt fully understood by many of you, but which may not be by some. In my experience the subject of perpetuities is not one that is expertly understood by all lawyers. (I hope I shall not be guilty of making any other such gross understatements!)

Let us assume a testator, a middle aged man, with a wife and no children, and a brother to whom he is very much attached. He leaves his property in trust, to his wife for life and then to his brother's children who reach twenty-five. The unfortunate provision limiting the gift to children who reach twenty-five may be the result of the brother's already having children who do not currently appear to be too thrifty, or perhaps just to the testator's general (and not uncommon) conviction that no children should be trusted with property until they are at least twenty-five.

The provision for children is totally void under the common-law rule. There are no if's about it, no but's, no waiting and seeing. The reason is simple. The brother, being alive, is legally presumed—and may well actually be—capable of having more children. And hence it is perfectly possible that some or all of the children who reach twenty-five may not do so until more than twenty-one years after the brother's death. For example, if the brother dies leaving a son aged one, that child, if it ever reaches twenty-five, will not do so until twenty-four years after the death of his parent. That obviously is more than twenty-one.

If I were in the classroom some student would be sure to ask, "Does that mean that the brother is the life in being?" My answer would probably be that there is no *the* life in being, but that the rule requires that there be some life in the picture so related to the limitation that it is absolutely certain that, if the takers ever qualify, they will do so within twenty-one years after the termination of this life. Perhaps it will be useful by way of explanation to add this comment. Had our testator made the gift to children who reach twenty-one, everything would have been lovely. The brother's children by the laws of nature are bound to be born (or at least conceived, which the law treats as just as good for this purpose) at his death and hence cannot fail to reach twenty-one within twenty-one years thereafter. Incidentally, I might remark that there are two simple legislative amendments of the common-law rule which would take the bugs out of this all too familiar type of will. One would set a limit, say fifty or fifty-five, after which a female is conclusively presumed to be incapable of having children. This would end the disturbing absurdity (or so most people think) illustrated by the famous case of *Jee v. Audley* where a gift was bad because of the possibility that a couple "of a very advanced age" (in fact, seventy) might have more children. The other would set a greater term in gross, say twenty-five or even thirty, and perhaps also provide for a kind of *cy-près* interpretation of the age provision, permitting the court to reduce it to the newly-established maximum, if necessary, to save the gift.

However, our new-fangled legislation does not proceed along these lines. On the expiration of the common-law period "any interests not then vested shall be void." The meaning of this is apparently that we wait for the life to elapse, and for twenty-one years afterwards, and then strike down any interests not yet vested as void. At this point my students would ask, "What life?" and I would be floored because no one yet knows the answer to that question—but again, more of that later.

To make the point I am trying to make, a little more vividly, let us assume that our testator has two brothers, *A* and *B*, and that he leaves (after the life estate to his wife) half to the children of *A* who reach twenty-five and the other half to the children of *B* who reach twenty-five. Brother *A* dies a year later, leaving a newborn daughter. As pointed out earlier, we don't really have to wait and see, but, if we do, the poor child will reach twenty-five twenty-five years thereafter, and her gift will be void.⁹ Thus a gift vesting in twenty-six years is bad

9. This assumes a common-law approach to possible lives in being. Whether the possibilities are increased under wait-and-see legislation is discussed in text beginning second paragraph following note 11 *infra*.

under the new legislation as a perpetuity. A short perpetuity soon curried, may we say.

Brother *B*, on the other hand, is the hearty type. Forty years later a first son is born. Brother *B* does not die of the shock, but lives another ten years, so the son reaches twenty-five only fifteen years after the father's death. Hence the gift to *B*'s children, although not vesting for sixty-five years, turns out to be perfectly valid under the new legislation. Thus we reach the result which to me, at least, seems anomalous—I could use a stronger word—that the gift vesting in twenty-six years is bad and the gift vesting in sixty-five years is good. Two gifts in the same will, in the same terms. One fails for remoteness in twenty-six years; the other flourishes—shall we say for “propinquity”—after sixty-five. Is this fair, is this sensible, is this due process?

The question will be asked “Is this not better than having both gifts doomed from the start as under the common-law rule?”

That is a fair and reasonable question. I think, however, the answer I would give is quite obvious. No—unless you want a gambling rule, based on circumstances purely fortuitous, having no apparent relevance to the public interest and not operating in the same way in all cases. If there is a need for a Rule Against Perpetuities—which I have ventured to cast some doubt on—and if the rule as framed is a reasonable one, we should not speak in terms of “doom” if it does operate. Subject to the suggestion made above that modern conditions would make appropriate an extension of the period of years to twenty-five or perhaps even thirty, it seems to me a reasonable and fair rule. (Of course under the suggested amendment, both limitations would be quite valid.) I do not remember hearing a more reasonable rule proposed. I should be happy to hear one, and espouse it—if convinced that it really is more reasonable.

If your patience with these abstractions is not exhausted, let me give one more illustration of the operation of the statute; at least let me try to, since the case I suppose is to me not completely translucent under the language of the act. Same limitation: *W* for life, then to the children of *B* who reach twenty-five. *T* dies, leaving *W*, and *B*, who as yet has no children. *W* dies. (A fact, I think, of no significance.) No one is now entitled to income; it goes to the heirs. (Nothing, I assume, in the statute changes this. And if unfortunate, it is *T*'s fault, not that of the statute.) Now *B* dies, leaving three children, one ten, one five, and the youngest, one.

Let us re-examine the statute, in the light of this situation. The gift to children is plainly a class gift. At the end of the common-law period—measured by actual events, so the statute says—“any interest

in members of a class the membership of which is then subject to increase shall be void." The class is obviously subject to increase, since no child is yet twenty-five. The period is twenty-one years from *B*'s death, since he is the only relevant life. Until all three children have either reached twenty-five or died, the class is subject to increase, since it includes all who reach twenty-five. (It can of course include no other children, since *B* is dead and can have no more—but this is irrelevant to our problem.)

Now observe, carefully. I should roll up my sleeves at this point. This is where I pull the rabbit out of the hat. The two older children will meet the test. That is, being five and ten, they will reach twenty-five (if ever) in twenty and fifteen years respectively. That is less than the twenty-one allowed; it is O.K. But poor little Baby can't make it. If he lives to reach twenty-five, he won't and can't do it for twenty-four years. That is too long; the limit is twenty-one. And if he does, he not only can't take, but he defeats his brothers. Because if he is alive as the race passes the crucial twenty-one year post, the whole gift fails. Why? Because Baby being alive, and not yet twenty-five, the class is still "subject to increase." Hence, the twenty-one years having elapsed, "any interest in members of a class . . . shall be void."

Then what happens, if the one year old disobligingly refuses to die, to save the gift to his brothers? The statute, under the general caption "Disposition when invalidity occurs," lists three categories. The first two are inapplicable, so our case falls into the third: "Any other void interest shall vest in the person or persons entitled to the income at the expiration of the period described in section 4(b)." This is to say, the common-law period measured by actual events. What does this mean? A learned writer¹⁰ has stated that this means "to the last income beneficiary," but with all respect, I cannot find this in the statute. *W* being dead, her life estate is terminated, so she is not entitled to the income. If she were, it would go to her estate, a result that would astonish an average testator. No one is entitled to the income in the sense that it is so limited in the will. Is the heir (*T*'s father in this instance) entitled to the income? If so, it is only because all limited interests having expired or been held void, it passes to him by way of reversion. On this theory he is entitled to the whole business; it is pointless to say he is entitled to the income. Normally, invalidity can scarcely occur *within* a life estate; it will happen twenty-one years after the termination of one; when it appears that remainders are void,

10. Cohan, *supra* note 1, at 325.

there will be no one entitled to income. One wonders at the meaning intended here.

Observe finally: by the rules governing class gifts, perpetuities aside, the two elder children would qualify as they reach twenty-five and be each entitled to at least a third. Under the statute the eldest will qualify, class-wise, six years before the history of the baby will determine whether he is entitled to *any* share. What happens to the property in this period? Class gifts are governed by various rules of convenience calculated to insure vesting and distribution as soon as possible. This is now nullified by a conspicuous rule of inconvenience.

Two points will quite conceivably, and I agree quite properly, be made. One is that, since the rule applies only to contingent interests in any event, a certain amount of wait-and-see is necessarily involved, and there is little harm in postponing the determination of the validity of the interest until the time comes when it is certain that it will vest or has vested. The second is that under the common law many courts have exhibited an unwillingness, or perhaps even have refused as a rule, to determine the validity of an interest until the termination of prior interests.

To these propositions it seems to me an adequate answer that there is a strong policy in favor of making possible the determination of the validity of interests at the earliest possible moment, which in the case of wills is the death of the testator. There are often excellent reasons why a *T* should make contingent limitations. He cannot know, in many instances, how many grandchildren he will have, let alone how many will reach twenty-five. Why add to this not particularly cruel uncertainty the hazard that the interest will be held void after parties have waited years for it to vest? Or they may not have waited; they may have died.

As to the argument that courts are frequently unwilling to decide at *T*'s death—and shouldn't—I think that except in Pennsylvania, this is an exaggeration on the facts. Courts are often lazy and willing to put off anything that can be put off—but I think any one who reads the current cases will agree that in a majority of instances courts are willing to decide such issues presently if anyone insists. It is, for example, an admirable place for a declaratory judgment, or a petition for instructions. In many cases jurisdiction is taken without discussion as a matter of course.

It is argued that if the validity of remainders is determined before the life estate terminates, those whose interests are involved may very well be minors and have no counsel, so that the matter will be inadequately argued. This is perhaps a valid argument in some connections,

but it does not appear so here. Under the common-law rule, no facts are in issue and nothing will or can happen during the life estate that bears on the issue. The issue is a simple one, although I grant that even courts do not always find it easy. Does a certain provision of a will violate a rule susceptible of immediate application? A good court should have no difficulty in deciding this without much argument and it is certainly always within the power of the court to have as much argument as it wishes or needs. Take the case we have been using for an example. If we assume that the testator has an elderly father who is his heir at law, it is obvious that under the common-law rule he has a reversion after the life estate. If this is doubted, there seems every reason why the matter should be clarified immediately. This will promote the practical handling of the matter by the wife and father, probably to the interest of both. The father quite conceivably may wish to respect his son's wishes, and release his interest to the brother, or at least effect a settlement. Under wait-and-see it may not be determined for many years or until after the father's death that he was the heir to valuable property. Under such circumstances it is less likely that he will make a generous compromise; after his death, his executors will be powerless to do so.

To this may be added the consideration that a trust is very likely to be involved. Trust companies are not conspicuously *inopes consilii*; they are likely to command the service of very high-bracket legal advice. Often they will have had a hand in drawing the instrument in question. That they have a stake—or a number of stakes—in defending it, is a proposition rather too obvious to need exploration. No, I don't think we need to be sorry for the contingent remaindermen.

A final word on this point. It is true that in Pennsylvania the courts have been conspicuously unwilling to make an early determination of validity. Regrettably so, as I see it. My good friend and colleague, Mr. Philip Brégy, in an article¹¹ justifying the new legislation (which he had a hand in framing) does it largely on the basis that Pennsylvania courts are going to wait-and-see anyhow.

I confess this seems to me inadequate. A bad practice should not be perpetuated by bad legislation. If the legislation is to be repealed or modified, as I have prophesied and as I think it surely will be when the complexities and inadequacies of its operation become apparent, the legislation must include some provision for the present determination (preferably by declaratory judgment) of the validity of future estates. Not to do this would be to effect only a partial cure.

11. Brégy, *supra* note 1.

If we now turn to my second proposition or assertion, it is by a somewhat devious route. Let us begin by asking this question: how are lives in being determined under the new legislation? As I have already pointed out, under the common-law rule there is not necessarily any life in being and the question of what life or lives, if any, will serve is determinable without much difficulty from the relationships and ages of the parties involved. Thus to repeat the illustration I have already used, a gift to the brother's children who reach twenty-one is perfectly valid. Does that rest on the life of the widow? Obviously not. Her life is quite irrelevant. There is no connection whatever between the time she dies and the time when the brother's children will reach twenty-one. On the other hand, since the brother's children must be born or conceived when he dies, they cannot fail to reach twenty-one within twenty-one years after his death. Thus he will serve as the life in being who saves the gift.

How is this under the statute? To make a problem let us go back to the version limiting the remainder to brother's children who reach twenty-five. Suppose in fact that the widow is young and tough and lives fifty years after testator's death. In that time all of the brother's children have been born and have reached the specified age. Not within twenty-one years of the death of their father, however, so that way of escape is out. But within the life of the widow who was alive at testator's death. May we treat her as the life in being and save the gifts?

The statute does not answer this question. I am sure that my average student would say "yes" and defend his answer by saying that "She is mentioned in the will and so one of the parties involved." If this is so, would the same be true of the lawyer whom testator expresses the wish to have employed, or the executor if he happens to be alive, or the testator's gardener whom the testator cautions as to the care of the hedge on his estate, and so on? Any number of people may be mentioned in the will. Is the gift good because it happens that someone mentioned in the will has obligingly been alive from the testator's death until the vesting of the gift?

But it will certainly be asked (and to my mind certainly *must* be asked) what is the magic in being mentioned? None of the characters just listed have anything to do with the growth of the brother's family; it is purely accidental from the standpoint of those children that they appear in the will.

Finally, if we decide to extend the matter to those mentioned in the will—not so much because it makes sense as because the statute does not forbid—why not logically (or at least with *equal* logic) extend it to

anyone who is alive when the testator dies and survives to the vesting of the gift? Thus it will be adequate if the claimant's attorney produces in court a character with a long grey beard and proves that he is 108 years old, and was alive when *T* died.

This, I submit, is an absurdity. To my mind, an *obvious* absurdity. But there is nothing in either the language or the philosophy of the statute to prevent!

So I revert to my second proposition: that if we insist on completely perverting the sense and intent of the rule, making it turn on the time when the remainder actually vests, then the period allowed by the common-law rule becomes meaningless and irrelevant, and some different one should be adopted. We have just seen what happened in the case of *T*'s brothers, *A* and *B*. One remainder was void although it vested in twenty-six years; the other was good, although it did not vest for sixty-five years. If we are really concerned with the time when the remainder actually vests, the determination should not rest on such whimsical considerations. A definite time limit should be set; at least we will know *when* validity is to be determined, even if we can't know what the result will be.

If we are to use a period in gross, how long shall it be? I have no idea. The proponents of wait-and-see appear not to have been impressed with the impropriety of making actual remoteness turn on something so inherently variable as human life, and so they have not suggested periods in gross. Statistics as to life expectancy don't help much, since we deal with an infinite variety of lives. Perhaps, if it turns out that the courts let us use *any* life, statistics might help. What is the age of the oldest substantially sizable group of living persons at any given time? Ninety-five? We should not allow for genuine rareties; certified centenarians might be hard to find.

So the rule might be that all remainders must vest within ninety-five years after *T*'s death. What a treat for those who are waiting to see! A testator by leaving the property for life to his youngest living heir, ninety-five years from his death, could create a reversion that might not vest in possession for 150 years. Absurd, I think, and I hope you agree—but it is where we naturally end up once we start thinking that validity of contingent remainders should depend on how long it is before they actually vest.

Let me close by raising briefly this question: how will the statute affect will-drafting? The proponents of this legislation have advertised it in such glowing terms that it would not be surprising if the impression prevailed that from now on will-drafting will be fool-proof, perpetuities-wise. If so, I fear you are doomed to disappointment. It

is *not* fool-proof; there are the same pitfalls as always for the ignorant or careless draftsman. I imagine that, if prudent, lawyers will (and should) for at least twenty years to come proceed largely to draft wills as if the common-law rule were still in force. Obviously any will valid under the common-law rule will be valid under the statute.

Conceivably, an attorney might be tempted to go beyond existing practice in two areas. First, there are a number of standard situations where a will is bad at common law because that law assumes as possible something which the draftsman knows to be either highly unlikely or in fact impossible. The administrative contingency. "Two years after the probate of my will." Or what Mr. Leach has called the fertile octogenarian. If the testator's brother is eighty-seven years old, there is no harm in limiting a remainder to his children who reach twenty-five or thirty-five or, if you like, eighty-seven. That manifests a rather extreme distrust of youth, but will be perfectly valid since we are reasonably sure that an eighty-seven year old man will not procreate further, and hence all of the beneficiaries, if any ever meet the test, will necessarily be children alive at the testator's death and will reach eighty-seven, if ever, in their own lives. But why take any chances? Simple drafting devices, long familiar, will do it without recourse to novel doctrines. "His children alive at my death," will do it.

The other area is highly speculative. If the courts permit the use of *any* life, can this be turned to use, drafting-wise? I doubt it. *T* can already specify ten new born female babies from families of conspicuous longevity. This will give him (using the life of the last to die) a good deal of rope; if he craves more, he may only hang himself. But, following the statutory principle, as to this we can only wait and see.

So, it all seems to me rather sad. The common-law rule is sound in conception and certain in operation. All of the objections to it—mostly its operation in freak cases, to tell the truth—can be eliminated by a few simple modifications of the common-law rule. These would be non-controversial and easy to enforce. A simple solution of a problem whose scope has been greatly exaggerated.

Instead, Pennsylvania has rushed blindly into legislation, to me unsound in theory, certainly wholly alien to the common-law concept, incomprehensible, unpredictable. Very sad. I hope we here may do something about it before it is too late. And you from other states—when some enthusiast starts a great hurrah for this new-fangled legislation, I hope you will at least adjure your brothers to think the matter over most prayerfully. Looking before leaping is much better than waiting and seeing.